

Under the influence - how far does the primary duty of care extend?

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Just how far might the primary duty of care in the proposed Health and Safety Reform Bill extend?

The Health and Safety Reform Bill has generated a lot of discussion in New Zealand. So far, particular attention has been paid to the new (albeit imported from Australia) concept of a “person conducting a business or undertaking” (a PCBU) and to the new due diligence obligations that will be imposed on officers.

One area that has not yet received as much attention is the new ‘primary duty of care’ set out in section 30 of the Bill, and the meaning of ‘influence’ in that section. Currently, section 30(1) of the Bill provides that all PCBUs must ... ensure, so far as is reasonably practicable, the health and safety of:

(a) Workers employed or engaged, or caused to be employed or engaged, by the PCBU while the workers are at work in the business or undertaking; and

(b) Workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

Assuming that the Bill passes into law in its current form, the primary duties set out in section 30(1)(a) and (b) will form the cornerstone of the new Health and Safety at Work Act.

So, just how far might these primary duties of care extend - who are the workers “whose activities... are influenced or directed by the PCBU”?

What do we know so far?

There is no definition of ‘influence’ in the current Bill and neither does the Bill’s explanatory note give an indication of the type of working relationships that section 30(1)(b) is intended to capture. Accordingly, the precise meaning and scope of section 30(1)(b) is open to interpretation and will need to be tested by the New Zealand Courts.

What we do know, however, is that one of the key goals of the new health and safety regime is to cast a wider net to ensure that health and safety obligations are not constrained by traditional ‘legal’ relationships.

This general notion is reflected in the Explanatory Memorandum for the Australian Model Law which explains (in relation to the equivalent Australian provision) that “influence connotes more than just mere legal capacity and extends to the practical effect the person can have in the circumstances” (our emphasis).

The idea is also reflected in WorkSafe New Zealand’s online commentary about the Bill, which explains that “PCBUs have to think broadly about who is working in their business or undertaking - including their contractors and not just their employees”.

Accordingly, the duty in section 30(1)(b) is likely to be interpreted broadly and, in considering whether a PCBU owes a duty under section 30(1)(b), the Courts will look past the legal technicalities and instead consider evidence which demonstrates the practical realities of the relationship and the degree of influence between the PCBU and the worker.

By way of example...

To help demonstrate the possible scope of section 30(1)(b) let’s consider a franchise arrangement. Typically, a franchisor contracts with a franchisee and the franchisee then employs a number of workers who carry out the day-to-day business independently of the franchisor.

Clearly, the franchisee will have a primary duty of care to its workers under the new section 30(1)(a). But what about the

franchisor? Will the franchisor owe a primary duty of care to the same workers under section 30(1)(b)? Are the workers' activities 'influenced or directed' by the franchisor?

Of course, the answer to these questions will always depend on the particular circumstances. However, given the degree of control and influence that many franchisors retain over the day-to-day operation of a franchisee's business (including factors such as the equipment that the franchisee must use, the location and layout of the premises, and the business policies and processes the franchisee must follow) there is a real prospect that a franchisor would be found to have a sufficient degree of influence over the workers' activities, and would therefore owe a primary duty of care under section 30(1)(b).

It is important to note that the franchisor's duty will of course be in addition to the primary duty that is owed by the franchisee. The Health and Safety Reform Bill makes it clear that more than one PCBU can hold the same duty and, in fact, section 27 of the Bill goes so far as to require each duty holder to (as far as is reasonably practicable) "... consult, co-operate with, and co-ordinate activities with all other persons who have a duty in relation to the same matter". This focus on consultation and cooperation between different duty holders will be a key part of the new health and safety regime and, as WorkSafe New Zealand explains:

PCBUs cannot 'contract out' of their duty. But they can and should make reasonable arrangements and coordinate responsibilities with the other PCBUs to fulfil their duty - so far as is reasonably practicable. The PCBUs should also monitor each other to ensure everyone is doing what they agreed.

The extent of a PCBU's duty depends on the level of influence or control the PCBU has over health and safety matters at work and the different circumstances that might be at play when there are multiple PCBUs.

The franchising arrangement is, of course, just one example of the different types of entities and working relationships that might be captured under the broader scope of the Health and Safety at Work Act. Other examples could include the various entities that work together within a supply chain arrangement; holding companies and their subsidiaries or trading companies; and funders who contract with service suppliers.

Essentially, any individual or entity that has a degree of control or influence over a workplace or over a worker's activities has a potential to be liable under section 30(1)(b), regardless of the technicalities of the contracting arrangements that may be in place.

In practice

Although the new primary duty under section 30(1)(b) is likely to be interpreted broadly and may well cover a range of working relationships that may not have previously been captured in New Zealand, the primary duty is still subject to the 'reasonably practicable' limitation.

That is, a PCBU is only required to do what is 'reasonably practicable' in all the circumstances and (as set out section 17 of the Bill). This test incorporates the concept of reasonableness based on a range of factors, such as the PCBU's knowledge about the hazard or risk, and the available ways of eliminating or minimising the risk.

In addition, although there may be a technical ability to prosecute those PCBUs who have a more distant relationship with workers, the practical reality is that WorkSafe New Zealand is much more likely to prosecute the PCBU who has the most direct relationship with the workers.

This view is supported by the position taken by the Governance Institute of Australia, which states that holding companies are likely to have a lower exposure to health and safety liability than companies that conduct operations and employ people.

What next?

The Health and Safety Reform Bill is currently before the Transport and Industrial Relations Committee and the Committee's report is not due until March 2015. The Bill is therefore still subject to change, though we think it is unlikely that the primary duty of care will change much, if at all.

To help prepare for the upcoming health and safety changes you should consider the various working relationships that you have, and ask yourself:

- Which workers (and workplaces) do I realistically have some degree of influence or control over?
- Do I know enough about the health and safety systems that are in place?
- Have I got systems to make sure I cooperate and consult with other PCBUs? In the context of less direct working relationships (such as in a franchise or subsidiary company situations) this final step of cooperation and consultation with other PCBUs is particularly important.

As WorkSafe New Zealand explains:

A PCBU that has less direct control or influence is more likely to fulfil its duty by making arrangements with the PCBU that is closer to the work and has more direct influence or control.

If you have a degree of influence over a workplace or workers, but don't have direct involvement or control, one option is to apply the same approach that an officer might take when exercising 'due diligence'.

While the obligations in each case are defined differently for strict legal purposes, practically there are clear similarities and we think due diligence provides a helpful framework for considering what steps a PCBU ought to take in situations of influence. Steps that you could take to ensure that you act with 'due diligence' in relation to health and safety include:

- Setting a clear health and safety strategy that promotes a positive and integrated health and safety culture, and outlining to the other entities and PCBUs that you work with what is required of them in this regard
- Having reasonable knowledge and understanding of the work that is being carried out by all of the entities that you work with, and have some degree of influence over and the associated risks and hazards involved in their work
- Satisfying yourself that all of the other PCBUs that you work with have effective health and safety compliance systems in place and that these are applied in practice (and having systems in place to continuously monitor this)
- Ensuring that health and safety is sufficiently resourced
- Ensuring that discussions and decisions made regarding health and safety are appropriately documented so that there is an "audit trail"
- Keeping up to date with developments in health and safety that are relevant in your area - for example, by subscribing to updates from WorkSafe New Zealand or attending relevant health and safety training and seminars.

This article was written by [Hamish Kynaston](#) and Holly Hedley for the ISN Magazine (November/December 2014 Issue).

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